APPENDIX i.

Opinion.

Joint Council of Teamsters, No. 42, et al., Petitioners,

v.

National Labor Relations Board, Respondent, Associated Independent Owner-Operators, Inc., Intervenor.

National Labor Relations Board, Petitioner,

v.

Building Material and Dump Truck Drivers, Local 420, et al., Respondents. Associated Independent Owner-Operators, Inc., Associated General Contractors of California, Inc., California Dump Truck Owners Association, Intervenors.

California Dump Truck Owners Association, Petitioner,

v.

National Labor Relations Board, Respondent. Associated Independent Owner-Operators, Inc., Intervenor.

Nos. 80-7455, 80-7456 and 80-7457.

Argued and Submitted Aug. 7, 1981. Decided Dec. 21, 1981.

As Amended on Denial of Rehearing and Rehearing En Banc March 2, 1982.

Before ELY and NORRIS, Circuit Judges, and COPPLE,* District Judge.

NORRIS, Circuit Judge:

We are called upon in this case to review an order of the NLRB declaring a provision in a collective bargaining agreement to be an unfair labor practice under § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) (1976). The Board invalidated article XIII of the Master Labor

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*The Honorable William P. Copple, United States District Judge for the District of Arizona, sitting by designation.

Agreement between unions and contractor-employers in the Southern California construction industry because it prohibited general contractors from hiring non-union dump-truck owner-operators. The unions petition to deny enforcement of the Board's order, and the Board seeks a judgment of enforcement.[1] The owner-operators seek an order directing the Board to grant a make-whole remedy requiring the unions to reimburse them for initiation fees and dues paid to the unions, and for income lost by those truck owners who were denied work. We enforce the Board's order, but remand with directions to the Board to fashion a make-whole remedy or show cause why a make-whole remedy is inappropriate.

I.

Section 8(e) prohibits agreements between unions and employers that require a self-employed person to join the union in order to work for the employer.[2] A construction industry proviso to § 8(e) carves out an exception for "work to be done at the site of the construction." Our inquiry is whether the Board erred in ruling that the operation of the

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[1]The general contractors intervene in support of the Board's position; they are represented by the Associated General Contractors of California, Inc., the Building Industry Association of California, the Engineering Contractors Association, and the Southern California Contractors Association. The unions include the Joint Council of Teamsters No. 42, et al. The truck owners are represented by the California Dump Truck Owners Association and the Associated Independent Owner-Operators, Inc. The proceedings below are reported at *Joint Council of Teamsters No. 42, et al.*, 248 N.L.R.B., 808 (1980).

[2]Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) (1976), provides that: "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract . . . whereby such employer . . . agrees to . . . cease doing business with any other person . . . *Provided*, that nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction."

owner-operated dump trucks in question is not on-site work within the meaning of the § 8(e) proviso.[3]

The facts are not in dispute. The dump truck operators haul materials from construction sites to remote dump sites, from "borrow" pits to construction sites, and from one construction site to another construction site. The truck owners spend most of their time on public roads away from the construction site. The only time spent at the construction site is during loading and unloading, when the dump truck operator ordinarily remains in his vehicle. *See Joint Council of Teamsters No. 42, et al.*, 248 N.L.R.B. 808, 816-17 (1980).

On these facts, the Board found that the owner-operators are delivery persons, not construction site workers, and therefore their work is not covered by the on-site proviso. That finding is consistent with Board findings in similar cases involving delivery of goods to a construction site. *See Drivers Local 695 v. NLRB*, 361 F.2d 547, 552 n.19 (D.C. Cir. 1966). In doubtful situations, we give weight to the Board's application of the Act, *NLRB v. Denver Building and Construction Trade Council*, 341 U.S. 675, 692, 71 S.Ct. 943, 953, 95 L.Ed. 1284 (1951); where, as here, the situation is not doubtful, we readily enforce the Board's order.

None of the unions' arguments against the Board's order is persuasive. First, they cite this circuit's recent interpretation of the on-site proviso in *Pacific Northwest Chapter of the Associated Builders and Contractors, Inc. v. N.L.R.B.*,

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[3]As a preliminary matter, the unions argue that the dump-truck owner-operators are not self-employed independent contractors, as the Board held, but employees of the general contractor. This argument is foreclosed, however, by *Associated General Contractors of California, Inc. v. NLRB*, 564 F.2d 271 (9th Cir. 1977), in which this court held that these same dump-truck owners are independent contractors.

654 F.2d 1301 (9th Cir.) (en banc), *cert. granted*, ___ U.S. ___, 102 S.Ct. 90, 69 L.Ed.2d ___ (1981). That case is not on point. The only issue decided in *Pacific Northwest* was whether the § 8(e) proviso "renders lawful clauses in collective bargaining contracts forbidding the employers to subcontract work *at any construction site* to a firm not having a contract with the signatory union." 654 F.2d at 1304 (emphasis added). In *Pacific Northwest*, where it was undisputed that the workers were engaged in on-site work, the court recognized that "the construction industry proviso narrowed the geographical scope of the [rule allowing secondary tactics] by introducing the jobsite limitation." 654 F.2d at 1313.

Second, the unions compare the on-site proviso in § 8(e) to an on-site proviso in the Davis Bacon Act (concerning minimum wages for construction workers on government contracts), arguing that the Federal Wage Appeals Board has held that it includes transportation between a construction site and a remote dump site. *See T. L. James & Co.*, Wage Appeals Board Case No. 69-2 (Aug. 13, 1969). We question the unions' reading of *T. L. James*. The Wage Appeals Board only held that a remote dump site or borrow pit is a part of the construction site. Slip op. at 6. The Board did not explicitly address the issue of transportation between the main site and the remote site. Moreover, we reject the unions' comparison of the two Acts. Neither the legislative history nor the text of the statute suggests that Congress intended § 8(e) to parallel the Davis Bacon Act.

Third, the unions rely on a Ninth Circuit affirmance of an arbitration award where, in the process of interpreting a provision in a collective bargaining agreement, the arbitrator determined that transportation between a construction site and a supply site was on-site work within the meaning of § 8(e). *See La Mirada Trucking, Inc. v. Teamsters Local*

Union 166, 538 F.2d 286, 288 (9th Cir. 1976), *cert. denied*, 429 U.S. 1062, 97 S.Ct. 787, 50 L.Ed.2d 778 (1977). That decision has little bearing on the case before us. In *La Mirada*, the court did not interpret the on-site proviso to § 8(e); the court merely held reasonable the arbitrator's interpretation of a provision in a collective bargaining agreement, which the parties had stipulated to be identical to the on-site proviso of § 8(e). 538 F.2d at 289. Thus, the *La Mirada* court did not hold as a matter of law that transportation between a supply site and a construction site fits within the construction industry proviso.

II.

The truck owners claim that the Board's cease and desist order is an inadequate remedy. They contend that the Board should also order reimbursement of initiation fees and dues that the truck owners had paid to the union plus compensation for income lost to those truck owners who were denied work.

Although § 10(c) of the Act[4] vests broad discretion in the Board to fashion remedies that effectuate the policies of the Act, *see Fibreboard Paper Products Corporation v. N.L.R.B.*, 379 U.S. 203, 216, 85 S.Ct. 398, 405, 13 L.Ed.2d 233 (1964), that discretion is not unlimited. *See Acco Construction Equipment, Inc. v. N.L.R.B.*, 511 F.2d 848, 852 (9th Cir. 1975). In cases where money has been collected illegally, the Board should order a refund, absent some rational ground for not doing so. *Id.* We hold that the Board has failed to offer a rational ground for refusing to order reimbursement in this case.

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[4]Section 10(c) of the Act, 29 U.S.C. § 160(c) (1976), provides that "the Board shall . . . take such affirmative action . . . as will effectuate the policies of this subchapter."

A.

The Board's principal reason for denying reimbursement is that the unions neither directly coerced the dump truck owner-operators to pay union fees nor illegally coerced the general contractors to accept article XIII in the collective bargaining agreement.[5] Either form of coercion would have constituted a violation of § 8(b)(4) of the Act.[6] Although the Board ruled that article XIII violated § 8(e) of the Act, it reasoned that reimbursement is inappropriate in the absence of a § 8(b)(4) violation.

We reject the Board's reasoning that the purposes of the Act are effectuated by reimbursement for violations of § 8(b)(4), but not for violations of § 8(e).[7] To be sure,

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[5]The Board offered the following explanation for its denial: "We hereby deny the Charging Party CDTOA's request that we require Respondent Unions to reimburse any owner-operators for payment of initiation fees and dues, deducted contributions to union benefit funds, or income lost by reason of the enforcement of unlawful terms in MLA art. XIII. The Board has on one occasion adopted without comment an administrative law judge's recommended Order containing such a remedy. *Local 814, Teamsters (Santini Brothers, Inc.)*. [208 N.L.R.B.] at 201. In the present case, however, no evidence has been introduced with respect to alleged losses directly attributable to actual coercion by Respondent Unions, nor has the remedial issue been expressly litigated. Furthermore, we find a reimbursement order, typically used to "make whole" *employees* for violations of the Act, to be generally overly broad and inappropriate in the context of 8(e) violations. We note that aggrieved owner-operators engaged in business as independent contractors may pursue a damage claim under Sec. 303 of the Act. For the foregoing reasons, we find that the reimbursement of owner-operators requested by CDTOA would not effectuate the remedial policies of the Act. *See Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al. v. N.L.R.B.*, 365 U.S. 651, 81 S.Ct. 875, 6 L.Ed.2d 1 (1961)." 248 N.L.R.B. at 817 n.34.

[6]29 U.S.C. § 158(b)(4) (1976).

[7]The NLRB claims that the Board has "consistently" declined to grant make-whole remedies in cases involving only violations of § 8(e). For support, the NLRB relies on *Newspaper and Periodical Drivers and Helpers Union v. N.L.R.B.*, 509 F.2d 99 (9th Cir. 1974), *cert. denied*, 423 U.S. 831, 96 S.Ct. 51, 46 L.Ed.2d 48 (1975). In that case, however, the court merely held that the Board did not abuse its discretion in denying back pay to independent contractors terminated in violation of § 8(e). Moreover, the Board's own decision in *Newspaper Drivers* offers no explanation for denying a make-whole remedy. *See Newspaper and Periodical Drivers' and Helpers Union Local 921*, 204 N.L.R.B. 440, 448 (1973). Thus, neither the Board's decision, nor the Ninth Circuit's brief affirmance, provides support for a *per se* rule denying reimbursement in § 8(e) cases.

reimbursement is inappropriate in the absence of coercion. *See Local 60, United Brotherhood of Carpenters v. N.L.R.B.*, 365 U.S. 651, 655-56, 81 S.Ct. 875, 877-78, 6 L.Ed.2d 1 (1961).[8] But when an unlawful collective bargaining agreement is itself coercive, there is no logical reason for denying reimbursement because of the absence of a technical § 8(b)(4) violation. Article XIII presented the truck owners with the grim choice of joining the union or foregoing work with the signatory employers. Although the unions may not have employed coercive tactics, violative of § 8(b)(4), the inclusion of article XIII in the collective bargaining agreement would necessarily have had the effect of coercing otherwise reluctant truck owners to join the union.[9] *See Sheraton-Kauai Corp. v. N.L.R.B.*, 429 F.2d 1352, 1357 (9th Cir. 1970).

We are unable to distinguish this case from two cases in which the Board ordered restitution to parties who joined

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[8]In *Local 60*, the Board had ordered reimbursement of union fees and dues paid while an illegal closed-shop preferential hiring agreement remained in effect. The Court refused to enforce the Board's order because it found no evidence that union membership had been coerced. The Court emphasized that persons affected by the order were already union members when employed on the job in question, and that no one had joined the union specifically to obtain work on that job. 365 U.S. at 654, 81 S.Ct. at 877. Thus, *Local 60* is readily distinguishable from the case before us.

[9]The Board stated that "no evidence has been introduced with respect to alleged losses directly attributable to *actual* coercion by Respondent Unions." 248 N.L.R.B. at 817 n.34 (emphasis added). We read the Board's statement as merely a finding that the unions did not directly confront truck owners and force them to join the union. Admittedly, the statement might be interpreted as an evidentiary ruling that the truck owners offered no proof that individuals had joined the union as a result of article XIII, as was the case in *Local 60, United Brotherhood of Carpenters v. N.L.R.B.*, 365 U.S. 651, 81 S.Ct. 875, 6 L.Ed.2d 1 (1961). We doubt, however, that the Board intended that meaning, since the record shows that at every available juncture the truck owners fought the unions' attempt at unionization. *See Associated General Contractors of California, Inc. v. N.L.R.B.*, 564 F.2d 271 (9th Cir. 1977).

unions pursuant to illegal collective bargaining agreements.[10] *See Sheraton-Kauai Corp.*, 177 N.L.R.B. 25 (1969), *enforced*, 429 F.2d 1352, 1357-58 (9th Cir. 1970). *Local 814, Teamsters (Santini Brothers)* 208 N.L.R.B. 184 (1974), *enforced*, 546 F.2d 989 (D.C.Cir.1976), *cert. denied*, 434 U.S. 818, 98 S.Ct. 56, 54 L.Ed.2d 73 (1977).

In *Santini Brothers*, by staging a walkout, the union coerced the employer to accept a restrictive collective bargaining agreement; enforcement of that agreement, in turn, coerced independent truckers to join the union. The Board found violations of both § 8(b)(4) and § 8(e), and ordered reimbursement to the independent truckers.

We are not persuaded that the § 8(b)(4) violation in *Santini Brothers* justifies granting restitution in that case, while denying it here. The Board would have restitution turn on the union's use of a coercive tactic, violative of § 8(b)(4), to persuade the employer to accept a restrictive provision. The relevant inquiry, however, is whether the truck owners, irrespective of any coercion of the employer, were coerced into union membership by an unfair labor practice.

The Board implicitly recognized this principle in *Sheraton-Kauai*. In that case, the employer and union illegally extended a union security clause in a collective bargaining agreement to employees of a new hotel, thus denying the employees an opportunity to resolve the question of union representation for themselves. The union did not coerce the employer in violation of § 8(b)(4); nor did the union directly coerce the employees. Nonetheless, the Board ordered restitution after finding that, by "submitting [the employees] to the terms and conditions of the . . . agreement," the

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[10]The Board cannot arbitrarily impose different remedies in similar situations. *See Burinskas v. NLRB*, 357 F.2d 822, 827 (D.C.Cir.1966) ("nor can [the Board] treat similar situations in dissimilar ways").

union effectively coerced the employees into union membership. 177 N.L.R.B. at 29.

Reimbursement in this case, as in *Sheraton-Kauai* and *Santini Brothers*, would effectuate the policies of the Act by returning to the truck owners money paid to support a union they did not freely choose to join, and by depriving the unions of the benefit of their unfair labor practice. *See Virginia Electric and Power Company v. N.L.R.B.*, 319 U.S. 533, 541, 63 S.Ct. 1214, 1219, 87 L.Ed. 1568 (1943); *Graphic Arts International Union Local 280 v. N.L.R.B.*, 596 F.2d 904, 910 (9th Cir. 1979).[11]

B.

We find unpersuasive the other reasons offered by the Board for denying reimbursement.

First, we are confused by the Board's contention that the remedial issue was not expressly litigated. The truck owners raised the remedy issue in their brief to the Board as charging party. To the extent that factual issues remain — such as the amount of damages — they can be resolved in an NLRB proceeding. *See N.L.R.B. v. Local 776, Film Editors*, 303 F.2d 513, 521 (9th Cir.), *cert. denied*, 371 U.S. 826, 83 S.Ct. 47, 9 L.Ed.2d 65 (1962).

Next, the Board said that the truck owners had an alternative remedy under § 303. It would be wasteful and unfair to force the truck owners, who have opposed unionization in legal proceedings for ten years, *see Associated General*

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[11]Counsel for the NLRB suggested that reimbursement would result in unjust windfalls to the truck owners who may have benefited from becoming signatories to the union. To the extent that the truck owners received actual benefits in return for their fees and dues, the value of these benefits may be deducted from the amount of reimbursable damages. We see no reason, however, to deny the truck owners the opportunity to show that they paid fees that did not lead to benefits. The issue whether fees and dues created comparable benefits remains to be litigated.

Contractors of California, Inc. v. N.L.R.B., 564 F.2d 271 (9th Cir. 1977), to renew the battle in a § 303 proceeding. Moreover, we see no reason to burden a federal district court with § 303 litigation, when reimbursement can be ordered in an NLRB proceeding. *Cf. Sheraton-Kauai Corporation v. N.L.R.B.*, 177 N.L.R.B. 25 (1969) (by implication) (ordering reimbursement where a § 303 remedy might have been available), *enforced*, 429 F.2d 1352 (9th Cir. 1970); *Local 814, Teamsters (Santini Brothers)* 208 N.L.R.B. 184 (1974) (same), *enforced*, 546 F.2d 989 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 818, 98 S.Ct. 56, 54 L.Ed.2d 73 (1977).

Finally, the Board noted that reimbursement orders are typically used to "make whole" *employees*. We note, however, that the Board has also ordered reimbursement for employers and independent contractors when to do so would effectuate the policies of the Act. *See, e.g., Graphic Arts International Union Local 280*, 235 N.L.R.B. 1084, 1085 (1978), *enforced*, 596 F.2d 904 (9th Cir. 1979) (employer); *Local 814, Teamsters (Santini Brothers)* 208 N.L.R.B. 184 (1974), *enforced*, 546 F.2d 989 (D.C. Cir. 1976), *cert. denied*, 434 U,.S. 818, 98 S.Ct. 56, 54 L.Ed.2d 73 (1977) (independent contractors).

For these reasons we remand to the Board to fashion a make-whole remedy[12] or to show good cause why a make-whole remedy would not effectuate the purposes of the Act.[13] *See Acco Construction Equipment, Inc. v. N.L.R.B.*, 511 F.2d 848, 852 (9th Cir. 1975).

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[12]We express no opinion at this stage of the proceedings as to whether the Board should order compensation for lost income resulting from enforcement of article XIII. The Board shall consider this claim of the owner-operators on remand.

[13]We note that the D.C. Circuit recently affirmed the Board's denial of a make-whole remedy for dump truck owner-operators in *Building Material and Dump Truck Drivers v. N.L.R.B.*, 669 F.2d 759 at 765-767 (D.C.Cir.1981). For the reasons expressed in text, we reach a different conclusion.

Order ENFORCED IN PART and REMANDED for consideration consistent with this opinion.

APPENDIX ii.

Decision and Order.

United States of America, Before the National Labor Relations Board.

Joint Council of Teamsters No. 42, and its Affiliated Local Unions, Sales Drivers & Dairy Employees, Local 166; General Truck Drivers, Local 235; General Truck Drivers, Chauffeurs & Helpers, Local 692; Chauffeurs, Teamsters and Helpers, Local 186; Building Material and Dump Truck Drivers, Local 420; General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 982; Truck Drivers, Warehousemen and Helpers, Local 898; Teamsters & Warehousemen, Local 381, All Affiliated With the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Teamsters, Chauffeurs, Warehousemen and Helpers, Local 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

and

Associated General Contractors of California, Inc.; Building Industry Association of California, Inc.; Engineering Contractors Association, Inc.; Southern California Contractors Association and California Dump Truck Owners Association.

Case 21—CE—196,

and

Associated Independent Owner-Operators, Inc.

Case 21—CE—199.

Building Material and Dump Truck Drivers, Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Associated Independent Owner-Operators, Inc.

and

Irvine-Santa Fe Company Party to the Contract.

Case 21—CE—200.

Building Material and Dump Truck Drivers, Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Irvine-Santa Fe Company)

and

Associated Independent Owner-Operators, Inc.

Case 21—CC—2004.

Upon appropriate charges,[1] the General Counsel of the National Labor Relations Board, by the Regional Director for Region 21, issued an order consolidating cases, a consolidated complaint, and a notice of hearing on January 23, 1979. Copies of the charges, complaint, and notice of hearing were duly served on Respondents.

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[1]The original charge in Case 21—CE—196 was filed on December 19, 1977, by California Dump Truck Owners Association (herein called CDTOA) against Joint Council of Teamsters No. 42, and its affiliated Local Unions, Sales Drivers & Dairy Employees, Local 166; General Truck Drivers, Local 235; General Truck Drivers, Chauffeurs & Helpers, Local 692; Chauffeurs, Teamsters and Helpers, Local 186; Building Material and Dump Truck Drivers, Local 420; General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 982; Truckdrivers, Warehousemen and Helpers, Local 898; Teamsters & Warehousemen, Local 381; all affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Teamsters, Chauffeurs, Warehousemen and Helpers, Local 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein collectively called Respondent Unions); and against Respondent Associated General Contractors of California, Inc.; Building Industry Association of California, Inc.; Engineering Contractors Association, Inc.; and Southern California Contractors Association (herein collectively called Respondent Associations). CDTOA filed a first amended charge in Case 21—CE—196 on December 23, 1977. The charge in Case 21—CE—199 was filed on January 3, 1978, by Associated Independent Owner-Operators, Inc. (herein called AIOO) against the Respondent Unions and the Respondent Associations. The charges in Cases 21—CE—200 and 21—CC—2004, involving the employer Irvine-Santa Fe Company (herein called Irvine), were filed on January 5, 1978, by AIOO against one of the Respondent Unions, Building Material and Dump Truck Drivers, Local 420 (herein called Respondent Local 420).

The complaint alleged that Respondent Unions and Respondent Associations had violated Section 8(e) of the Act by entering into agreements whereby the employer-members of Respondent Associations have ceased or refrained, or agreed to cease or refrain, from doing business with other persons. The complaint alleged further that Respondent Local 420 had violated Section 8(b)(4)(ii)(A) of the Act. Respondents filed answers to the complaint and thereby denied the commission of any unfair labor practices.

On June 23, 1979, the parties in the consolidated cases executed a stipulation of facts and a motion to transfer proceedings to the Board in which the parties waived a hearing before an administrative law judge and agreed to submit the cases directly to the Board for findings of fact, conclusions of law, and a Decision and Order, based on a record consisting of the stipulation of facts and extensive exhibits attached thereto. On September 13, 1979, the Board approved the stipulation of the parties and transferred the proceedings to the Board. Thereafter, the General Counsel, CDTOA, Respondent Unions, Respondent Associations, and Respondent General Truck Drivers, Local 235, filed briefs with the Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

The Board has considered the entire record stipulated by the parties[2] and the briefs filed by the parties, and hereby makes the following findings and conclusions:

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[2]On January 26, 1979, the United States District Court for the Central District of California issued an injunction against Respondents pursuant to a petition filed by the General Counsel under Sec. 10(1) of the Act. Copies of the pleadings, order, and all relevant documents filed by the parties have been attached as an exhibit to the stipulation of facts.

Findings of Fact

I. The Business of the Employers

Respondent Associations, comprised of various employers in the building and construction industry in southern California, engage in collective bargaining for and negotiate collective-bargaining agreements on behalf of their respective employer-members with various labor organizations, including Respondent nions. In the course and conduct of business operations, Respondent Associations, in the aggregate, annually purchase and receive goods, materials, and supplies valued in excess of $50,000 directly from suppliers outside the State of California.

Irvine is a general contractor in the building and construction industry in southern California. At all times material herein, Irvine has been engaged in a construction project in the city of Alhambra, California (herein called the Alhambra project), where it has subcontracted certain work to various subcontractors, including Pacific Railroad Constructors. In connection with its work as a subcontractor of Irvine on the Alhambra project, Pacific Railroad Constructors has purchased and received materials and supplies valued in excess of $50,000 directly from suppliers located outside the State of California.

The parties stipulated, and we find, that the employer-members of the Respondent Associations, including Irvine, are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

The parties stipulated, and we find, that each of Respondent Unions is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.[3]

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[3]The stipulation of facts indicates that Respondent General Truck Drivers, Local 235, is now merged with and subsumed by Sales Drivers, Food Processors, Warehousemen & Helpers Local 952.

III. The Alleged Unfair Labor Practices

A. *The Issues*

1. Do certain sections pertaining to owner-operators in article XIII of Respondents' current collective-bargaining agreement violate the general prohibition in Section 8(e) of the Act?

(a) Are the owner-operators of for-hire dump trucks independent contractors or employees within the meaning of the Act?

(b) If the owner-operators are independent contractors, are the sections of article XIII which apply to them secondary in nature?

2. Is article XIII limited to construction jobsite work in a way which entitle it, even if secondary, to protection under the first proviso to Section 8(e) of the Act?

3. Has Respondent Local 420 violated Section 8(b)(4)(ii)(A) of the Act by engaging in threatening or coercive conduct with an object of forcing self-employed persons to join a labor organization?

B. *The Stipulated Facts*

On or about July 1, 1977, Respondent Associations, on behalf of their employer-members, including Irvine, entered into a Master Labor Agreement (herein called the MLA) with Respondent Unions. The MLA is effective from July 1, 1977, until June 15, 1980, and covers all of the southern California area except San Diego County.

The following sections of MLA article XIII, entitled "Owner-Operators," are at issue in this proceeding:

> 1302. The Owner-Operator shall be carried on the payroll of the Contractor as an employee and as such, all the terms and conditions of this Master Agreement and any amendment or amendments thereto, shall be

applicable to him except as provided elsewhere in this Article and except that in the event that it is determined that the services of an Owner-Operator were terminated without just cause, any payment for time lost shall be limited to the wage and fringe benefit payments provided in this Agreement, and shall not in any event include any payment with respect to the equipment or the loss of use thereof; and except, further, that Owner-Operator shall not be subject to the provisions of Paragraph 201, sub-paragraph 201.1 through 201.7.1 inclusive.

1303. *Hiring:*

The Contractor or subcontractor shall make every reasonable effort to refer to the Local Union with area jurisdiction over the work all Owner-Operators or drivers of equipment for clearance before work begins; and, in any event, the Union shall be notified of the name and Social Security number of the Owner-Operator within forty-eight (48) hours after the Owner-Operator begins work on that job.

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1306. *Union Membership:*

(a) All employees who are presently members of a Local Union hereunder shall, as a condition of continued employment, maintain such membership in good standing.

(b) As a condition of continued employment, all employees covered by this Agreement shall on the 8th day after commencing employment under this Agreement, or the date of this Agreement, which ever is later, become and remain members of the Local Union in good standing.

1307. *Terminations:*

The Contractor or subcontractor will terminate the employment of any employee covered by this Agreement after notice by the Union, or the Local Union

with jurisdiction in the event such employees shall fail to comply with Section 1306 of this Article; provided that membership in the Union, or the Local Union with jurisdiction was available to such employee on the same terms and conditions generally applicable to other members, and the membership was not denied or terminated for reasons other than the failure of the employee to render the periodic dues, and the initiation fees uniformly required as a condition of acquiring and retaining membership. Such employee shall not be re-employed by the Contractor or subcontractor until the employee has paid or tendered to the Local Union with jurisdiction, any such initiation fee, reinitiation fee or dues accrued to date of termination.

* * * * *

1312. The provisions of this Article have been negotiated and agreed upon by and between the parties for the objects and purposes expressed in Paragraph 1313 of the Article. The parties have not undertaken to negotiate for the employees any profit whatsoever for the leasing and rental of the equipment they drive. On the contrary, compensation for the equipment shall be set by Agreement between the Contractor and the Owner-Operator at a level which will not circumvent or defeat the payment of wages, fringes and conditions of any employee covered by this Master Labor Agreement and which will assure compensation to the Owner-Operator of not less than the actual cost of operation of such equipment.

1313. It is further mutually understood and agreed that the intent of this Article is to assure the payment of wages, fringes, and conditions as provided in the Master Agreement and to prohibit the making and carrying out of any plan, scheme or device to circumvent or defeat the payment of wages, fringes and conditions as provided in this Master Agreement. Any such agree-

ment, contract or arrangement presently in existence shall be abrogated upon the execution of this Agreement.

* * * * *

1314. It is further agreed that the Contractor will not devise or put into operation any scheme, whether herein enumerated or not to defeat the terms of this Article of this Master Agreement, nor shall any Owner-Operator's arrangement with a Contractor be terminated for the purpose of depriving any other employee of employment. In the event that the Contractor has available equipment, the Owner-Operator may be assigned to operate such equipment on the job during the period of the repair of the Owner-Operator's equipment and not to exceed that work shift and so long as no employee is laid off of provide work for such equipment.

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1317. It is understood by the parties that this Agreement provides for an Employer-Employee relationship between the Contractor or subcontractor and each Owner-Operator of equipment used hereunder.

1318. It is recognized that many Owner-Operators have executed "short-form" agreements with the Teamsters Union which incorporate by reference provisions of this Master Labor Agreement. The provisions of such "short-form" agreement shall be applicable to said Owner-Operators only in their capacity as employers, i.e., when such Owner-Operators are employing one or more employees. When Owner-Operators are working on a job covered by this Master Labor Agreement their employment shall be covered by the Owner-Operator clause of this Agreement.

1319. If a Contractor through the grievance procedure is found violating any portion of this Article, the Joint Adjustment Board or the Impartial Chairman,

as described in Article V, shall require the Contractor to immediately pay compensatory damages for each Owner-Operator with respect to whom the Contractor is in violation in an amount equal to the sum of Health and Welfare and Pension contributions, under the terms of this Agreement, for eight hours for each day or portion thereof the violation occurred such damages to be made payable to the Construction Teamsters Security Fund by check promptly mailed to the respective Local Union. The Joint Adjustment Board or Impartial Chairman may also grant such further relief as may be deemed appropriate.

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1321. Notwithstanding any other provision of this Agreement, this Article XIII shall be applicable only to Owner-Operators performing (or who, upon their employment, will be performing) work to be done at the site of construction, alteration, painting or repair of a building, structure, or other construction work.

1321.1 The term "work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other construction work" as used in the Paragraph 1321 shall include all driving to, from and in connection with hauling materials to or from any source or disposal site on the one hand, and a geographical site of construction, on the other hand, in accordance with the following:

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1321.1.2 Hauling of materials between a primary location and a secondary location not excluded by Paragraph 1321.1.1 above[4] that is located five (5) or less miles by the

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[4]For unknown reasons, the complaint, stipulation of facts, and briefs fail to set forth the terms of MLA paragraph 1321.1.1, which states:

1321.1.1 Delivery of materials to or from commercial suppliers or public dumps off the primary location shall always be exempt from the provisions of Article XIII. Any other general exclusions from the construction industry proviso, previously defined by the NLRB or the courts, shall continue to be applicable in interpreting Article XIII.

closest feasible means of access from the nearest boundary of the primary location shall be work to be done at the site, effective August 1, 1977.

1321.1.3 Hauling of material between a primary location and a secondary location located in excess of five (5) miles by the closest feasible means of access from the nearest boundary of the primary location shall not be work to be done at the site, effective August 1, 1977.

1321.2 Effective January 1, 1978, the mileage outlined in Paragraphs 1321.1.2 and 1321.1.3 will be increased to six (6). Effective July 1, 1978, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to seven (7). Effective January 1, 1979, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to eight (8). Effective July 1, 1979, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased no nine (9). Effective January 1, 1980, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to ten (10).

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1321.5 It is expressly understood that if a haul is covered by the terms of this Section, all time spent on any public road shall be covered as well as all other time spent in connection with such haul.

1321.6 The Owner-Operator shall become a bona-fide employee as defined in Paragraphs 1301 and 1302 upon reporting for work on the first day on that job, such employee status to be effective from the first hour of work performed.

The parties agree that the foregoing provisions of the MLA apply to the owner-operators of dump truck equipment who perform certain hauling services within the geographic area covered by the MLA for the construction contractors

who are employer-members of Respondent Associations.[5] Although contractors have in some instances used their own driver-employees in company-owned trucks to haul material to and from construction sites, they usually must engage dump truck owner-operators to perform such work. On occasion, a contractor may deal directly with and be billed directly by an owner-operator for a particular job, but the prevalent practice for the procurement of an owner-operator's services involves a tripartite relationship among the contractor, owner-operator, and a trucking broker known as an overlying carrier. Under a typical arrangement, a contractor contracts with an overlying carrier for the provision of needed transportation services. The overlying carrier then performs such services either by using his own equipment, vehicles, and employee-drivers, or by using owner-operators with whom the overlying carrier has executed subhaul agreements.

An overlying carrier commonly has subhaul agreements with numerous owner-operators. In turn, an individual owner-operator usually has subhaul agreements with several overlying carriers. A construction contractor, however, ordinarily has no direct agreement with an owner-operator and no control over an overlying carrier's selection of the owner-operator who will work for the contractor. Although bound by subhaul agreement, an owner-operator is free to refuse an overlying carrier's job referral, to leave a job prior to

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[5]These and similarly occupied owner-operators elsewhere in California have been the subject of considerable litigation, hereinafter discussed, before the Board and the courts of appeals. In reference to prior litigation, the parties herein agree that the evidence adduced at a Board representation case hearing in Case 21—RD—1008 remains unchanged and applicable to the determination of the owner-operators' present employment status. The evidence in this proceeding accordingly includes both an extensive statement of stipulated facts and the record from Case 21—RD—1008, which is attached as an exhibit to the stipulation.

its completion, or to substitute another owner-operator in his stead. Pursuant to one or more subhaul agreements, an owner-operator may work on several different jobsites for several different contractors within a week or even a single day.

Whenever an owner-operator's vehicle travels in excess of 50 feet along a public highway, the activities of the owner-operator and overlying carrier are regulated by the California Public Utilities Commission (PUC), which establishes minimum tariffs designed to reflect the costs of both labor and equipment use for any job. The requirements of a particular job, however, may result in trilateral negotiations for the payment of a rate higher than the PUC minimum. When an overlying carrier refers an owner-operator to a contractor for a job, the overlying carrier bills and collects sums due from the contractor, deducts 5 percent as a brokerage fee, and transmits the remainder to the owner-operator. Whether the mode of payment is direct from contractor to owner-operator or through an overlying carrier, an owner-operator keeps his own record for billing purposes of time spent on the job and submits a freight bill based on that record to the appropriate parties. (Some contractors use an employee designated as a "load checker" to maintain a separate record of an owner-operator's hours for purposes of verifying the freight bill's accuracy.) An owner-operator is generally paid in gross, with no deductions for taxes or benefit payments, and only for hours when his equipment is in actual use. In contrast, employee-drivers of a contractor receive hourly-based net wages for the duration of a fixed workday, even if their company-owned vehicles are not operating at all times.

The dump truck equipment used by an owner-operator in the performance of services for construction contractors varies, but may include a tractor, a semitrailer unit, a truck

and transfer trailer, a tractor with a bottom dump trailer, a semibottom dump trailer, or a truck and pup trailer. All owner-operators own at least one power unit. Additional power, trailer or service equipment may be purchased or leased. An owner-operator is responsible for all costs of owning, operating, maintaining, or repairing any equipment used. These costs include the basic expense of financing equipment purchases or leases and the additional expenses entailed by, *inter alia*, PUC permit, bonding, and liability insurance requirements, California licensing fees, Federal and state income taxes, Federal highway use taxes, and any traffic violations.

A contractor may use the services of a dump truck owner-operator for a variety of construction projects, including the construction of highways, residential or commercial structures, underground passageways, and overhead bridges. Whatever the project, owner-operators participate in the loading, hauling, and unloading of materials between two sites. In some instances, an owner-operator's activities take place entirely within the physical confines of the construction project, herein called the geographical site of construction.[6] In other instances, an owner-operator must haul materials along a private or public right-of-way between the geographical site of construction and a remote location.[7] If the latter type of haul originates at the site of construction, it typically involves hauling excess excavated materials or refuse to a remote dumping location which may be either

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[6]The stipulation of facts defines the geographical site of construction as "including contiguous lands temporarily used during the construction, upon which the final highway, road, structure, building, conduit, canal, channel, bridge or other things will be located after that construction activity is complete."

[7]As used in the stipulation of facts, the term "remote" applies to a location which is physically separated from the geographical site of construction by more than the width of a public road.

a public dump or a site opened by the contractor specifically for the construction project, or hauling broken asphalt to a crushing facility where the material's components are separated for reuse. If the haul terminates at the geographical site of construction, it typically involves hauling material from a remote "borrow pit" opened by the contractor specifically to obtain materials needed for a construction project, or hauling materials from a remote commercial source of supply such as a rock crushing plant, asphalt supplier, sand pit, or dirt pit. In addition to the foregoing, an owner-operator may haul material such as dirt from the contractor's geographical site of construction to another geographical site of other construction, which may or may not involve the same contractor.[8]

Whether at the geographical site of construction or at a remote "borrow pit" established by a contractor, an employee of the contractor, usually a member of the Operating Engineers Union, operates a skip-loader or other equipment to load material into an owner-operator's dump truck. At a remote commercial source of supply, the commercial vendor's employee, who may or may not be a member of any labor organization, loads the owner-operator's truck by methods which vary according to the material involved. The method of unloading materials at any site also varies, depending upon the type of dump truck, the type of material hauled, and—at a geographical site of construction—the nature of the construction project. An owner-operator knows from experience to dump a load as closely as possible to where a bulldozer operator or grader operator, usually a

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[8]Employee-drivers of a contractor also perform all of the types of hauls described. The record indicates, however, that although employee-drivers of contractors in Respondent Associations operate loading equipment, pickup trucks, water trucks, and flatbed trucks, they do not usually drive the kind of dump truck equipment used by owner-operators.

member of Operating Engineers, is working. During loading or unloading procedures, the owner-operator ordinarily remains in his vehicle and does not converse with any employee on the site. The owner-operator is solely responsible for the operation of his truck, but he may receive general instruction from a construction project superintendent or directional signals from a contractor's employee-flagman, who is usually a member of the Laborers Union. At any geographical site of construction or remote location, actual loading times vary in average from 1 to 7 minutes and actual unloading times average 3 minutes or less. The total amount of time spent at any location by the owner-operator may vary depending upon, *inter-alia*, waiting time. A contractor utilizing an owner-operator's services is cost-motivated to insure that the owner-operator spends an absolute minimum of time per haul. In this regard, a contractor normally tries to locate a remote source of supply or dumping site as close as possible to the geographical site of construction. A contractor may also designate the route to be traveled to and from the geographical site of construction, although owner-operators are often free to choose their own route. The owner-operator ordinarily drives at approximately 30 miles per hour on public roads but more slowly on undedicated roads, so that travel time between a geographical site of construction and a remote site 5 miles away would average 25 minutes.

In reference to the relationship between the aforementioned provisions of MLA article XIII and the aforementioned activities of California dump truck owner-operators, the parties have placed into evidence and stipulated the credibility of sworn affidavits given by Gary Hope, a project superintendent for MLA signatory construction contractor Irvine, and Lendelle Kinder, a dump truck owner-operator. Hope stated that during the first week of December 1977,

he had a conversation with Charles Tanberg, business agent for Respondent Local 420, at Irvine's Alhambra, California, construction site. Tanberg told Hope in this conversation that the MLA required all truckdrivers on Irvine's job, including owner-operators, to join the Teamsters. Thereafter, Hope, stated, he observed Tanberg stopping trucks on December 22, 1977, in the loading area at the Alhambra jobsite and talking to the drivers. Later in the morning, Hope learned that one of Irvine's foremen had permanently "signed out" some truckdrivers because they were not members of the Teamsters. After futile attempts to secure more trucks, Hope called an overlying carrier and "told him not to send any more truckers unless they were members of the Teamsters."

Kinder's affidavit corroborates Hope's statement. According to Kinder, he was working as an owner-operator driver at Irvine's Alhambra jobsite on December 22, 1977, when Tanberg asked to see his Teamsters card. During the ensuing conversation, Tanberg indicated to Kinder that he would not be continuing his work for Irvine because he was not a union member. At the end of the day, Kinder was told by Irvine's foreman not to return on the following morning, in spite of the availability of additional work, because of the "union problem."

C. *Contentions of the Parties*

The General Counsel, CDTOA, and Respondent Associations all contend that the provisions of MLA article XIII set forth in full above are proscribed by Section 8(e) of the Act. Specifically, these parties argue that article XIII applies to owner-operators who are independent contractors, is secondary in nature, and is not privileged by the construction industry poroviso to Section 8(e) because it is not limited to construction jobsite work. The General Counsel further

contends that Respondent Local 420 has threatened, coerced, and restrained owner-operators who are independent contractors of Irvine with an object of forcing or requiring them to join a union, in violation of Section 8(b)(4)(ii)(A) of the Act.

With respect to both the alleged 8(e) and 8(b)(4)(ii)(A) violations, Respondent Unions contend that the dump truck owner-operators at issue are employees rather than independent contractors. Respondent Unions therefore contend that article XIII and the alleged conduct of Respondent Local 420 must be considered primary and lawful in nature when applied to owner-operators *qua* employees of the employer-members of Respondent Associations. Even if the Board finds the owner-operators to be independent contractors, Respondent Unions assert that article XIII is properly limited to jobsite work and entitled to the protection of the construction industry proviso.

D. *Discussion and Conclusions*

1. The alleged 8(e) violation

Section 8(e) of the Act forbids entry into a collective-bargaining agreement whereby an employer agrees to refrain from dealing in the product of another employer or to cease doing business with any other person.[9] It is well established,

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[9]The actual text of Sec. 8(e) provides in relevant part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work
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> . . . .

however, that contract clauses which may technically fall within the literal proscription of Section 8(e) are not unlawful if the clauses are found to have the primary objective of preserving or protecting work performed by the contracting employer's employees.[10] Furthermore, even clauses which are secondary in nature and within the general proscription of Section 8(e) may be lawful and protected if they satisfy the requirements for exemption under the construction industry proviso to Section 8(e).

The complaint alleges that the several cited paragraphs of article XIII in Respondents' MLA violate Section 8(e) because they require signatory employers to cease doing business with dump truck owner-operators who are independent contractors on any terms other than those applicable to unit employee-drivers under the MLA. In determining the merits of the complaint, we are faced with the threshold question whether the owner-operators actually are independent contractors, rather than employees, when working for the employer-members of Respondent Association.[11] If the owner-operators are employees within the meaning of the Act, then article XIII is primary in scope and the complaint must be dismissed.

As indicated in the previous section of this Decision, the Board is no stranger to proceedings involving the employment status of these owner-operators. In 1971, petitions were filed in Cases 21—RD—1008 and 20—RD—721 to decertify the Teamsters Unions as representatives of the

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[10]*National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612 (1967).

[11]Under Sec. 2(3) of the Act, the term "employee" does not include "any individual having the status of an independent contractor." General agency principles, paramount among which is the "right-to-control" test, apply to the determination of whether an individual is an employee or independent contractor. *N.L.R.B. v. United Insurance Company*, 390 U.S. 254 (1968).

dump truck owner-operators within the Unions' respective southern and northern California jurisdictions. After separate hearings, the Board consolidated the two representation cases for issuance of a Decision and Order finding the owner-operators to be employees.[12] Subsequent to hearings on additional matters, the Board issued a Supplemental Decision and Direction of Election in each of the representation proceedings.[13] Before the directed elections could be conducted, the Teamsters and various employer associations in the California construction industry executed new collective-bargaining agreements for both southern and northern California. As a result, parallel unfair labor practice charges were filed with the Board alleging violations of Section 8(a)(2) and (1) of the Act and "blocking" further processing of the representation cases. The Board thereafter issued a Decision and Order adopting an administrative law judge's findings that the alleged unfair labor practices had been committed.[14]

Upon a petition for enforcement and a cross-petition for review, the United States Court of Appeals for the Ninth Circuit denied enforcement of the Board's Order because it found, contrary to the Board, that the owner-operators were independent contractors who were not properly part of any employee unit.[15] Upon remand of the unfair labor practice case from the court, the Board consolidated it with the representation cases still pending and issued a Supplemental Decision and Order finding "pursuant to law of the

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[12]*Contractor Members of the Associated General Contractors of California, Inc.*, 201 NLRB 311 (1973).

[13]*Contractor Members of the Associated General Contractors of California, Inc.*, 209 NLRB 363 (1974); 209 NLRB 366 (1974).

[14]*Associated General Contractors of California, Inc., et al.*, 220 NLRB 540 (1975).

[15]*Associated General Contractors of California, Inc. v. N.L.R.B.*, 564 F.2d 271 (1978).

case" that the dump truck owner-operators were independent contractors, not employees.[16] Prior inconsistent Decisions were vacated and all proceedings were dismissed.

Notwithstanding the foregoing history of litigation, Respondent Unions seek *de novo* consideration of the dump truck owner-operators' status in the present case and urge the Board to find these individuals to be employees. We do not regard such a course of action as appropriate. In the prior representation case and unfair labor practice case litigation, the same parties as are involved herein, or their privies, were present and fully litigated the identical issue of employment status considered herein. Moreover, there has been no significant change in the nature of the owner-operators' work since that litigation terminated. Accordingly, under established principles of *res judicata* and collateral estoppel, the final and conclusive finding in the prior cases that the dump truck owner-operators are independent contractors is controlling in this proceeding.[17]

The owner-operator provisions of MLA article XIII, paragraphs 1302, 1303, 1306, 1307, 1312-19, and 1321.6, require all employer-members of Respondent Associations to cease doing business with dump truck owner-operators who do not become union members and employee-drivers subject to all terms of the MLA. Such provisions, applied to individuals whom we have found to be independent contrac-

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[16]*Associated General Contractors of California, Inc., et al.*, 239 NLRB No. 100 (1978).

[17]See, e.g., *Graneto-Datsun, A Graneto Company*, 220 NLRB 399 (1975); *International Longshoremen's and Warehousemen's Union, et al. (California Cartage Company, Inc.)*, 215 NLRB 541, 542 (1974); *Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO (New York Telephone Company)*, 197 NLRB 866, 867-868 (1972).

tors, are secondary on their face.[18] They are designed to serve the general institutional interests of Respondent Unions in organization rather than any specific legitimate interests of bargaining unit employees in unit work preservation.[19] Accordingly, we find that the aforementioned provisions of MLA article XIII violate Section 8(e) of the Act, unless they are entitled to protection under the construction industry proviso.

The critical inquiry with respect to the applicability of the construction industry proviso to article XIII concerns whether that article covers only "work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work." All parties agree that article XIII, on its face and in practice, applies to transportation work performed by dump truck owner-operators off the geographical site of construction. The General Counsel and CDTOA contend that such coverage *per se* exceeds the jobsite limitation, as it has been defined in legislative

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[18]*Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Santini Brothers, Inc.)*, 208 NLRB 184, 198-200 (1974); *Newspaper & Periodical Drivers' & Helpers Local 921, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (San Francisco Newspaper Printing Co., Inc.)*, 204 NLRB 440 (1973); *Highway Truck Drivers and Helpers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; et al. (S & E McCormick, Inc.)*, 199 NLRB 531 (1972); *Milk Wagon Drivers and Creamery Workers Local Union No. 66 of Seattle, Washington and Vicinity, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Carnation Company)*, 181 NLRB 882, 886 (1970); *General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 982, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; et al. (J. K. Barker Trucking Co.)*, 181 NLRB 515, 520-521 (1970); and see *A. Duie Pyle, Inc. v. N.L.R.B.*, 383 F.2d 772 (3d Cir. 1967).

[19]We note that none of Respondents have even argued in their briefs that the owner-operator provisions have a valid work preservation purpose if the dump truck owner-operators are in fact independent contractors.

history and Board precedent. Respondent Unions argue, however, that offsite work should be considered jobsite work within the meaning of the proviso if it involves only the transportation of materials between a contractor's geographical site of construction and a remote dumping or supply site established up to 10 miles away by the contractor for exclusive use in connection with work at the geographical site of construction. They further contend that article XIII applies only to the owner-operators' jobsite work, as so defined.[20]

The legislative history of Section 8(e) and its construction industry proviso is sparse in references to the precise definition of jobsite work intended by Congress. In this regard, the House Conference report stated only that:

> It should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the site of the construction. The proviso does not exempt from Section 8(e) agreements relating to supplies and materials or other products shipped or otherwise transported to, and delivered, on the site of construction.[21]

In addition, the legislative history more generally suggests that a primary motivation for the enactment of the proviso

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[20]Respondent Associations admit that art. XIII is not limited to jobsite work within the meaning of the Act. They urge the Board to articulate a "majority time" jobsite definition which would apply to all transportation work by the owner-operators herein if a majority of each day's working time is spent at the geographical site of construction and/or at a contractor-controlled remote site where the contractor's own employees are also working.

[21]H. Conf. Rept. 1147, 86th Cong., 1st sess., p. 39; Leg. Hist. 943. See also the legislative history set forth in *Ohio Valley Carpenters District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Cardinal Industries, Inc.)*, 136 NLRB 977, 988-989 (1962).

was the desire to prevent potential labor strife between union and nonunion personnel working at the same jobsite.[22]

Interpreting legislative intent from the foregoing, the Board has consistently adhered to a narrow definition of jobsite work when evaluating contractual provisions on a case-by-case basis. It has found that the proviso clearly does not extend to offsite work merely because such work *could be done* at the site of construction.[23] Furthermore, the Board has refused in several cases to apply the proviso's coverage to various types of transportation work wherein deliveries have been made directly on the geographical site of construction. In particular, the Board has found that none of the following constitutes jobsite work: the mixing, delivery, and pouring of ready-mix concrete;[24] the delivery of precast concrete pipe;[25] the "bringing of tools, materials, and personnel to and from the site of construction";[26] and the delivery of sand landfill.[27]

We must evaluate the work coverage provisions of MLA article XIII, contained in paragraph 1321 and subparagraphs

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[22]See, e.g., the discussion of legislative history in *International Union of Operating Engineers, Local Union No. 12, AFL—CIO (Robert E. Fulton)*, 220 NLRB 530, 536 (1975).

[23]*Ohio Valley Carpenters District Council (Cardinal Industries)*, *supra* at 988.

[24]*International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 294 (Island Dock Lumber, Inc.)*, 145 NLRB 484 (1963); *Teamsters Local Union No. 559, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Connecticut Sand and Stone Corporation)*, 138 NLRB 532 (1962).

[25]*Joint Council of Teamsters No. 42, et al. (Inland Concrete Enterprises, Inc.)*, 225 NLRB 209 (1976).

[26]*Local Union No. 282, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (D. Fortunato, Inc.)*, 197 NLRB 673 (1972).

[27]*Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America Clemence D. Stanton, d/b/a Rexforo Sand and Gravel Co.)*, 195 NLRB 378, (1972).

thereto, in light of the foregoing legislative history and precedent. Without the limitations on coverage stated in subparagraph 1321.1.1, the remainder of paragraph 1321 would on its face apply the secondary provisions of article XIII to non-jobsite work. Specifically, the owner-operator provisions would without subparagraph 1321.1.1 cover the offsite transportation of all materials between a geographical site of construction and any remote location within an area expanding from 5 to 10 miles away from the site during the life of the MLA. Article XIII would then not be entitled to protection under the construction industry proviso, because it would clearly apply to the various types of transportation work defined as offsite work by the Board in the cases cited in the preceding paragraph.

Subparagraph 1321.1.1, however, states that article XIII does not apply to the "delivery of materials to or from commercial suppliers or public dumps."[28] As indicated in the preceding section of this Decision, the parties have inexplicably failed in the complaint, stipulation of facts, and briefs to refer to the express terms of subparagraph 1321.1.1. Respondent Unions nevertheless implicitly rely upon the limiting language of this subparagraph by admitting in their brief that neither the delivery of materials from a remote commercial source to the geographical site of con-

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[28]Subparagraph 1321.1.1 also states that "[a]ny other general exclusions from the construction industry proviso, previously defined by the NLRB or the courts, shall continue to be applicable in interpreting Article XIII." We give no wieght to this language. An explicit, self-contained, and clearly illegal contractual provision, such as the secondary owner-operator provision herein, will not be purged of its illegality by a vague and general "savings clause." See *The Essex County and Vicinity District Council of Carpenters and Millwrights, United Brotherhood of Carpenters and Joiners of America, AFL—CIO (Associated Contractors of Essex County, Inc.)*, 141 NLRB 858, 869 (1963); *Perry Coal Company, Midwest-Radiant Corporation, and Peabody Coal Company*, 125 NLRB 1256 (1956).

struction nor the cartage of materials away from the geographic site to a remote commercial dumping site constitutes jobsite work within the meaning of the Act and the MLA. We agree, and find that subparagraph 1321.1.1 on its face so limits article XIII as to exclude from its coverage such offsite construction work.[29]

Notwithstanding the limitation expressed in subparagraph 1321.1.1, we find that paragraph 1321 in its entirety clearly extends the coverage of article XIII to nonjobsite work. Paragraph 1321 does not, in fact, conform to the jobsite definition advocated by Respondent Unions, because it does not restrict article XIII to the transportation of materials between a contractor's geographical site of construction and a remote location *controlled by the same contractor* for use in connection with work at the geographical site of construction. On the contrary, article XIII undisputedly covers dump truck owner-operators who are engaged in the transportation of materials between different contractors' geographical sites of construction. Such hauls may include the transportation of materials to or from, as well as the loading or dumping of materials on, a jobsite controlled by a nonunion contractor. The Board has twice refused to broaden the jobsite definition under the construction industry proviso to permit application of a contract's secondary provisions to work performed for a subcontractor at a remote location established exclusively or partially to service a contractor's

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[29]Although it is unnecessary to refer to extrinsic evidence for interpretation of an unambiguous contractual provision, we note that our view of the restrictive import of subparagraph 1321.1.1 is supported by the affidavit of George A. Pappy, submitted by Respondent unions during the injunction proceeding before the district court. On the other hand, other witness affidavits submitted in that proceeding indicate that Respondent Unions have ignored the subparagraph's limitations in their efforts to enforce art. XIII.

geographical site of construction.[30] If remote locations not controlled by the contractor for a geographical site of construction cannot be viewed as extensions of the contractor's jobsite, and we reaffirm that they cannot whether or not they are themselves actual construction sites, then the transportation of materials between such sites is no different than the transportation of materials between a geographical site of construction and a remote commercial supply or dumping location. As previously stated, the Board has consistently held that such work is not jobsite work.

Even if we were to accept the premise that article XIII covers only the transportation of materials between sites up to 10 miles apart but controlled by the same contractor, we would find such coverage to be overbroad. Based on the parties' estimates of average times involved, article XIII would apply to an owner-operator who in the course of a 10-mile roundtrip haul spends an average of 10 minutes combined at the geographical site of construction and the remote location and an average of 50 minutes in offsite travel. The primary purpose of the construction industry proviso—to avoid tensions among groups of employees at the same site—has little relevance to persons having such incidental contact with the site. The legislative history of the proviso demonstrates that Congress shared this conclusion by expressing its specific intent to exempt from the proviso the total process of transporting materials in spite of the fact that some tasks in that process might take place on a construction jobsite.[31] Consistent with this intent, the

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[30]*Operating Engineers, Local Union No. 12 (Robert F. Fulton), supra; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers (Bigge Drayage Company)*, 197 NLRB 281 (1972).

[31]*Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union No. 631, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Reynolds Electrical and Engineering Co., Inc.)*, 154 NLRB 67, 95 (1965).

Board has repeatedly held that the proviso does not apply to jobsite deliveries (or, by logical inference, pickups) which are only a small part of basically offsite transportatioin activity. In the present case, we perceive no justification for departing from this well-established precedent merely because the transportation activity takes place between and involves brief work on two sites controlled by the same construction contractor.[32] The secondary owner-operator provisions of articles XIII clearly extend to predominately offsite transportation work performed by dump truck owner-operators. We find that such work is not jobsite work within the meaning of the construction industry proviso.[33]

For the foregoing reasons, we find that the secondary provisions of article XIII are not entitled to protection under the construction proviso. Accordingly, we find that those provisions violate Section 8(e) of the Act.

2. The alleged 8(b)(4)(ii)(A) violation

Uncontroverted record evidence conclusively demonstrates that Respondent Local 420, through its business agent, Charles Tanberg, threatened a self-employed dump truck owner-operator, Lendelle Kinder, with loss of a job at the Alhambra, California, jobsite of construction con-

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[32]We reject Respondent Unions' argument that the definition of jobsite work in the proviso to Sec. 8(e) should be identical to the definition of jobsite work in the Davis-Bacon Act. That Act, as a remedial statute, is broader in coverage than the 8(e) proviso. *International Union of Operating Engineers, Local Union No. 12 (Acco Construction Equipment, Inc.)*, 204 NLRB 742 (1973); *Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers, Local Union No. 695, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. N.L.R.B.*, 361 F.2d 547, 553 (D.C. Cir 1966).

[33]We leave open the question whether, if ever, the definition of jobsite work under the proviso may include the brief and incidental transportation of materials between two proximate, but not physically contiguous, geographical sites of construction, each of which is exclusively controlled by the same contractor.

tractor Irvine unless Kinder would become a member of Local 420. The evidence further shows that Respondent Local 420, through Tanberg, coercively insisted that Irvine cease doing business with independent contractors who were not and would not become members of Local 420. Based on such evidence, we find that Respondent Local 420 has threatened, coerced, and restrained Irvine and the independent contractors of Irvine with an object of forcing or requiring the independent contractors to join a labor organization, in clear violation of Section 8(b)(4)(ii)(A) of the Act.

The Remedy

Having found that Respondents have engaged in unfair labor practices, we shall order them to cease and desist therefrom and to take certain affirmative action to effectuate the purpose of the Act.[34]

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, we make the following:

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[34]We hereby deny the Charging Party CDTOA's request that we require Respondent Unions to reimburse any owner-operators for payment of initiation fees and dues, deducted contributions to union benefit funds, or income lost by reason of the enforcement of unlawful terms in MLA art. XIII. The Board has on one occasion adopted without comment an administrative law judge's recommended Order containing such a remedy. *Local 814, Teamsters (Santini Brothers, Inc.), supra* at 201. In the present case, however, no evidence has been introduced with respect to alleged losses directly attributable to actual coercion by Respondent Unions, nor has the remedial issue been expressly litigated. Furthermore, we find a reimbursement order, typically used to "make whole" *employees* for violations of the Act, to be generally overbroad and inappropriate in the context of 8(e) violations. We note that aggrieved owner-operators engaged in business as independent contractors may pursue a damage claim under Sec. 303 of the Act. For the foregoing reasons, we find that the reimbursement of owner-operators requested by CDTOA would not effectuate the remedial policies of the Act. See *Local 60, United Brotherhood of Carpenters and Joiners of America, AFL—CIO, et al. v. N.L.R.B.*, 365 U.S. 651 (1961).

Conclusions of Law

1. The employer-members of Associated General Contractors of California, Inc., Building Industry Association of California, Inc., Engineering Contractors Association, Inc., and Southern California Contractors Association are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The following organizations are labor organizations within the meaning of Section 2(5) of the Act: Joint Council of Teamsters No. 42, and its affiliated Local Unions, Sales Drivers & Dairy Employees, Local 166; General Truck Drivers, Local 235; General Truck Drivers, Chauffeurs & Helpers, Local 692; Chauffeurs, Teamsters and Helpers, Local 186; Building Material and Dump Truck Drivers, Local 420; General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 982; Truckdrivers, Warehousemen and Helpers, Local 898; Teamsters & Warehousemen, Local 381; all affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

3. By threatening, coercing, and restraining persons engaged in commerce, including Irvine-Santa Fe Company and the independent contractors of Irvine, with an object of forcing or requiring the independent contractors of Irvine to join a labor organization, Building Material and Dump Truck Drivers, Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, has engaged in unfair labor practices in violation of Section 8(b)(4)(ii)(A) of the Act.

4. By entering into, maintaining, and giving effect to the aforementioned paragraphs in article XIII of the Master

Labor Agreement between Respondent Associations and Respondent Unions, Respondents have engaged in unfair labor practices in violation of Section 8(e) of the Act.

5. The above unfair labor practices are unfair labor practices affecting commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Building Material and Dump Truck Drivers, Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall:

1. Cease and desist from threatening, coercing, and restraining Irvine-Santa Fe Company or the independent contractor dump truck owner-operators of Irvine with an object of forcing or requiring the owner-operators to join a labor organization.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix A."[35] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's rep-

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[35]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

. . . .

Note that appendices to the Board's decision are not reproduced in this Appendix ii.

resentative, shall be posted by said Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail to said Regional Director sufficient copies of the aforementioned notice for posting at the premises of Irvine-Santa Fe Company, if willing.

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent Local 420 has taken to comply herewith.

B. Respondents Joint Council of Teamsters No. 42, and its affiliated Local Unions, Sales Drivers & Dairy Employees, Local 166; General Truck Drivers, Local 235; General Truck Drivers, Chauffeurs & Helpers, Local 692; Chauffeurs, Teamsters and Helpers, Local 186; Building Material and Dump Truck Drivers, Local 420; General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 982; Truckdrivers, Warehousemen and Helpers, Local 898; Teamsters & Warehousemen, Local 381; all affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, their officers, agents, and representatives, shall:

1. Cease and desist from entering into, maintaining, giving effect to, or enforcing the provisions of article XIII in their 1977-80 Master Labor Agreement with Associated General Contractors of California, Inc., Building Industry Association of California, Inc., Engineering Contractors

Association, Inc., and Southern California Contractors Association, to the extent found unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at their business offices and meeting halls copies of the attached notice marked "Appendix B."[36] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondents' representative, shall be posted by said Unions immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Unions to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail to said Regional Director sufficient copies of the aforementioned notice for posting at the premises of Associated General Contractors of California, Inc., Building Industry Association of California, Inc., Engineering Contractors Association, Inc., and Southern California Contractors Association, and their employer-members, if willing.

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent Unions have taken to comply herewith.

C. Respondents Associated General Contractors of California, Inc., Building Industry Association of California, Inc., Engineering Contractors Association, Inc., and Southern California Contractors Association, and their employer-members, their officers, agents, successors, and assigns, shall:

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[36]See fn. 35, *supra*.

1. Cease and desist from entering into, maintaining, giving effect to, or enforcing the provisions of article XIII in their 1977-80 Master Labor Agreement with the Respondent Unions, to the extent found unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at their places of business copies of the attached notice marked "Appendix C."[37] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by representatives of the Respondent Associations, shall be posted by the Associations and their employer-members immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Associations and their employer-members to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent Associations have taken to comply herewith.

Dated, Washington, D.C. March 31, 1980.

John H. Fanning, Chairman

John A. Penello, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[37]See fn. 35, *supra*.

APPENDIX iii.

29 U.S.C. § 152(3)

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

29 U.S.C. § 158(b)(4)

(b) It shall be an unfair labor practice for a labor organization or its agents—

> (4) (i) to engage in, or to induce or encourge any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are en-

gaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

29 U.S.C. § 158(e)

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4) (B) of this section

the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

29 U.S.C. § 160(c)

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations

and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

APPENDIX iv.

Article xiii

Owner-Operator

1300. Owner-Operator is an individual that holds legal or registered title to a motor vehicle or to the power equipment unit thereof in his name and who personally drives such vehicle or unit in the performance of work covered by this Agreement.

1301. The Contractor expressly reserves the right to control the manner, time, means and details of, and by which the Owner-Operator performs his services, as well as the ends to be accomplished, and shall be the sole judge of the capability of the Owner-Operator's equipment to perform the work required to be performed and may if the Contractor determines that the Owner-Operator's equipment is not capable of performing the work required to be performed, terminate such Owner-Operator's services; provided, however, that the Owner-Operator may file and process a grievance under paragraph 1319 hereof on the grounds that the Contractor's determination that the Owner-Operator's equipment is inadequate was a pretext for terminating the Owner-Operator's services. Failure to work the day or one-half (½) day out, as directed, shall terminate the Owner-Operator's employment and he shall be paid only for actual time worked prior to such failure. The Contractor shall not pay for time spent by the Owner-Operator in repairing, servicing, or maintaining his equipment after termination of employment or before or after his shift, or half-shift, as the case may be.

1302. The Owner-Operator shall be carried on the payroll of the Contractor as an employee and as such, all the terms and conditions of this Master Agreement and any amendment or amendments thereto, shall be applicable to

him except as provided elsewhere in this Article and except that in the event that it is determined that the services of an Owner-Operator were terminated without just cause, any payment for time lost shall be limited to the wage and fringe benefit payments provided in this Agreement, and shall not in any event include any payment with respect to the equipment or the loss of use thereof; and except, further, that Owner-Operator shall not be subject to the provisions of paragraph 201, sub-paragraph 201.1 through 201.7.1 inclusive.

1303. Hiring:

The Contractor or subcontractor shall make every reasonable effort to refer to the Local Union with area jurisdiction over the work all Owner-Operators or drivers of equipment for clearance before work begins; and, in any event, the Union shall be notified of the name and social security number of the Owner-Operator within forty-eight (48) hours after the Owner-Operator begins work on that job.

1304. The equipment usage rate shall be set by agreement between the Owner-Operator and the Contractor. Equipment usage is the amount agreed between the Contractor and the Owner-Operator for the use of his equipment. Separate checks shall be issued by the Contractor for (a) wages and (b) equipment usage. Wages, fringes, payroll taxes and subsistence when applicable shall be paid in addition to the equipment usage amount referred to herein.

1305. Upon request of the Union, the Contractor shall make available a copy of his equipment usage agreement with the Owner-Operator.

1306. Union Membership:

(a) All employees who are presently members of a Local Union hereunder shall, as a condition of continued employment, maintain such membership in good standing.

(b) As a condition of continued employment, all employees covered by this Agreement shall on the 8th day after commencing employment under this Agreement, or the date of this Agreement, whichever is later, become and remain members of the Local Union in good standing.

1307. Terminations:

The Contractor or subcontractor will terminate the employment of any employee covered by this Agreement after notice by the Union, or the Local Union with jurisdiction in the event such employee shall fail to comply with Section 1306 of this Article; provided that membership in the Union, or the Local Union with jurisdiction was available to such employee on the same terms and conditions generally applicable to other members, and the membership was not denied or terminated for reasons other than the failure of the employee to render the periodic dues, and the initiation fees uniformly required as a condition of acquiring and retaining membership. Such employee shall not be reemployed by the Contractor or subcontractor until the employee has paid or tendered to the Local Union with jurisdiction, any such initiation fee, re-initiation fee or dues accrued to date of termination.

1308. No provision of other articles of this Agreement shall be interpreted as requiring payments for the use, maintenance or servicing of the Owner-Operator's equipment.

1309. Compensation for the equipment shall be by check, paid monthly, for the full amount due, less any agreed advances. A statement of any charges by the Employer shall be issued at the same time.

1310. The Owner-Operator shall provide and shall have sole responsibility for gasoline, oil, grease, tires, tubes, repairs and any other items necessary to operate his equipment. He shall have complete freedom to purchase any such items at any place where efficient service and satisfactory products can be obtained at the most favorable prices.

1311. There shall be no interest or handling charge on earned money advances prior to the regular pay day.

1312. The provisions of this Article have been negotiated and agreed upon by and between the parties for the objects and purposes expressed in Paragraph 1313 of the Article. The parties have not undertaken to negotiate for the employees any profit whatsoever for the leasing and rental of the equipment they drive. On the contrary, compensation for the equipment shall be set by Agreement between the Contractor and the Owner-Operator at a level which will not circumvent or defeat the payment of wages, fringes and conditions of any employee covered by this Master Labor Agreement and which will assure compensation to the Owner-Operator of not less than the actual cost of operation of such equipment.

1313. It is further mutually understood and agreed that the intent of this Article is to assure the payment of wages, fringes, and conditions as provided in this Master Agreement and to prohibit the making and carrying out of any plan, scheme or device to circumvent or defeat the payment of wages, fringes and conditions as provided in this Master Agreement. Any such agreement, contract or arrangement presently in existence shall be abrogated upon the execution of this Agreement.

1314. It is further agreed that the Contractor will not devise or put into operation any scheme, whether herein enumerated or not to defeat the terms of this Article of this

Master Agreement, nor shall any Owner-Operator's arrangement with a Contractor be terminated for the purpose of depriving any other employee of employment. In the event that the Contractor has available equipment, the Owner-Operator may be assigned to operate such equipment on the job during the period of the repair of the Owner-Operator's equipment and not to exceed that work shift and so long as no employee is laid off to provide work for such equipment.

1315. Compensation for Use of Owner-Operator's Equipment:

Compensation of compensable time under this Section shall start at the time the Owner-Operator has his equipment in a satisfactory condition and in readiness to perform in response to a definite order and request from the Contractor under the provisions of the Agreement. Time shall cease when the Owner-Operator returns to the point designated by the Contractor minus any time due to delays beyond the control of the Contractor, including but not limited to the breakdown of Owner-Operator's equipment, or equipment available for his use, inclement weather, breakdown or cessation of work on the project affecting the need and/or use of his equipment.

1316. Any insurance coverage on Owner-Operator's equipment desired by the Contractor over and above $100,000/300,000/100,000 shall be at the sole expense of the Contractor.

1317. It is understood by the parties that this Agreement provides for an Employer-Employee relationship between the Contractor or subcontractor and each Owner-Operator of equipment used hereunder.

1318. It is recognized that many Owner-Operators have executed "short-form" agreements with the Teamsters

Union which incorporate by reference provisions of this Master Labor Agreement. The provisions of such "short-form" agreement shall be applicable to said Owner-Operators only in their capacity as employers, i.e., when such Owner-Operators are employing one or more employees. When Owner-Operators are working on a job covered by this Master Labor Agreement their employment shall be covered by the Owner-Operator clause of this Agreement.

1319. If a Contractor through the grievance procedure is found violating any portion of this Article, the Joint Adjustment Board or the Impartial Chairman, as described in Article V, shall require the Contractor to immediately pay compensatory damages for each Owner-Operator with respect to whom the Contractor is in violation in an amount equal to the sum of Health and Welfare and Pension contributions, under the terms of this Agreement, for eight hours for each day or portion thereof the violation occurred, such damages to be made payable to the Construction Teamsters Security Fund by check promptly mailed to the respective Local Union. The Joint Adjustment Board or Impartial Chairman may also grant such further relief as may be deemed appropriate.

1319.1. Notwithstanding any other provision of this Agreement, the sole and exclusive remedy for any violation of this Article XIII shall be sought under the provision of Article IV of this Appendix.

1320. Separability:

If any paragraph of this Article XIII should be held invalid by operation of law or by any tribunal of competent jurisdiction, or if compliance with or enforcement of any paragraph of this Article XIII should be restrained by such tribunal pending a final determination as to its validity, the remainder of this Agreement or the application of such

Article or paragraph to persons or circumstances other than those as to which it has been held invalid or as to which compliance with or enforcement of, has been restrained, shall not be affected thereby. Should the foregoing eventually arise, the parties agree to negotiate substitute paragraphs or Articles upon sixty (60) days' written notice by one to the other. In the event the parties fail to reach agreement within sixty (60) days following the beginning of such negotiations, either party shall be free to take whatever economic or legal action it may deem necessary in support of its bargaining position, notwithstanding the no-strike provisions of this Agreement; provided, however, that the party initiating such action shall give to the other party a fifteen (15) day written notice of intention to take such action.

1321. Notwithstanding any other provision of this Agreement, this Article XIII shall be applicable only to Owner-Operators performing (or who, upon their employment, will be performing) work to be done at the site of construction, alteration, painting, or repair of a building, structure, or other construction work.

1321.1 The term 'work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other construction work' as used in the paragraph 1321 shall include all driving to, from and in connection with hauling materials to or from any source or disposal site on the one hand, and a geographical site of construction, on the other hand, in accordance with the following:

1321.1.1 Delivery of materials to or from commercial suppliers or public dumps off the primary location shall always be exempt from the provisions of Article XIII. Any other general exclusions from the construction industry pro-

viso, previously defined by the NLRB or the courts, shall continue to be applicable in interpreting Article XIII.

1321.1.1.1 A public dump is a disposal site available to, and in substantial use by, the public.

1321.1.2 Hauling of materials between a primary location and a secondary location not excluded by paragraph 1321.1.1 above that is located five (5) or less miles by the closest feasible means of access from the nearest boundary of the primary location shall be work to be done at the site, effective August 1, 1977.

1321.1.3 Hauling of material between a primary location and a secondary location located in excess of five (5) miles by the closest feasible means of access from the nearest boundary of the primary location shall not be work to be done at the site, effective August 1, 1977.

1321.2 Effective January 1, 1978, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to six (6). Effective July 1, 1978, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to seven (7). Effective January 1, 1979, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to eight (8). Effective July 1, 1979, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to nine (9). Effective January 1, 1980, the mileage outlined in paragraphs 1321.1.2 and 1321.1.3 will be increased to ten (10).

1321.3 It is understood that the foregoing shall not include travel time to and from the Owner-Operator's home (or parking place other than his home) to the place or source of work.

1321.4 Jobs commenced or bid prior to August 1, 1977 shall be continued under conditions in effect prior to that date, for the duration of the project.

1321.5 It is expressly understood that if a haul is covered by the terms of this Section, all time spent on any public road shall be covered as well as all other time spent in connection with such haul.

1321.6 The Owner-Operator shall become a bonafide employee as defined in paragraphs 1301 and 1302 upon reporting for work on the first day on that job, such employee status to be effective from the first hour of work performed.

1322. Disagreement over interpretation or application of this Article shall be subject to the Grievance and Arbitration procedure as described in this Appendix.